125

(30)

(29)

FILED
APR 13 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-294
(consolidated with No. 08-289)

In the
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KYLE T. CUTTS
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85012
(602) 200-0104

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioners

April 13, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

BOTH 4FNEFP

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. The Legislature Has Standing To Protect Its Legislative Prerogatives. 1

II. The Ninth Circuit Misapplied The Rule 60(b) Standard 4

A. The Ninth Circuit's Decision Violates This Court's Precedents. 5

B. Arizona Has Satisfied The "Flexible" Standard Under Rule 60(b). 11

1. Changes In Fact Require Reassessing The Injunction. 12

2. Changes In Law Require Reassessing The Injunction. 18

3. HB 2064 Poses No Impediment To Rule 60(b) Relief. 24

III. The Court Should Direct The Restoration Of Local Control Over Arizona's Schools 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. McCurry,
449 U.S. 90 (1980) 9

Board of Educ v. Dowell,
498 U.S. 237 (1991) 11

Castaneda v. Pickard,
648 F.2d 989 (5th Cir. 1981) 14, 23, 24

Coleman v. Miller,
307 U.S. 433 (1939) 2

Connecticut v. Spellings,
453 F. Supp. 2d 161 (D. Conn. 2006) 20, 26

Evans v. City of Chicago,
10 F.3d 474 (7th Cir. 1993) 11

Forty-Seventh Legislature v. Napolitano,
213 Ariz. 482 (2006) 3

Frew v. Hawkins,
540 U.S. 431 (2004) 6, 8, 9, 11

General Motors Corp. v. EPA,
363 F.3d 442 (D.C. Cir. 2004) 26

Glover v. Johnson,
138 F.3d 229 (6th Cir. 1998) 11

Gonzalez v. Crosby,
545 U.S. 524 (2005) 7

Hodel v. Virginia Surface Mining & Reclamation Ass'n,
452 U.S. 264 (1981) 4

HUD v. Rucker,
535 U.S. 125 (2002) 22

Karcher v. May,
484 U.S. 72 (1987) 2

Kokkonen v. Guardian Life Ins. Co.,
511 U.S. 375 (1994) 26

Lewis v. Casey,
518 U.S. 343 (1996) 23

Lujan v. National Wildlife Fed'n,
497 U.S. 871 (1990) 23

Miller v. French,
530 U.S. 327 (2000) 7

Missouri v. Jenkins,
515 U.S. 70 (1995) 11

Morse-Starrett Prods. Co. v. Steccone,
205 F.2d 244 (9th Cir. 1953) 6

New York v. United States,
505 U.S. 144 (1992) 9

Proctor v. Hunt,
43 Ariz. 198 (1934) 2

Railway Employees v. Wright,
364 U.S. 642 (1961) 4

Roosevelt Elem. Sch. Dist. No. 66 v. Bishop,
179 Ariz. 233 (1994) 17

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) 4, 6, 8, 9, 11

Schildhaus v. Moe,
335 F.2d 529 (2d Cir. 1964) 6

Sixty-Seventh Minnesota State Senate v. Beens,
406 U.S. 187 (1972) 3

Stanley v. Darlington County Sch. Dist.,
84 F.3d 707 (4th Cir. 1996) 4

State ex rel. Woods v. Block,
189 Ariz. 269 (1997) 2

Tachiona v. United States,
386 F.3d 205 (2d Cir. 2004) 3

United States v. Swift & Co.,
286 U.S. 106 (1932) 5, 6, 7, 10, 11

United States v. United Shoe Mach. Corp.,
391 U.S. 244 (1968) 10

Valley Forge Christian College v. Americans United for Separation of Church and State,
454 U.S. 464 (1982) 22

Yes on Prop 200 v. Napolitano,
215 Ariz. 458 (Ct. App. 2007) 9

Statutes and Regulations

20 U.S.C. § 1702(a) 22

20 U.S.C. § 1703(f) 13

20 U.S.C. § 1712 ..... 21, 22

20 U.S.C. § 1713(g) 21

20 U.S.C. § 1720(a) 21

20 U.S.C. § 6302 26

20 U.S.C. § 6801 26

20 U.S.C. § 6812(2) 20

20 U.S.C. § 6847 21

34 C.F.R. § 299.10(b) 20

Ariz. Rev. Stat. § 15-756.11(G) 25

Other Authorities

GARNER, BRYAN A.,
A DICTIONARY OF MODERN AMERICAN USAGE... 21

Vander Ark, Tom,
America's High School Crisis: Policy Reforms That Will Make a Difference,
EDUCATION WEEK, Apr. 2, 2003..... 15

WRIGHT, MILLER, & KANE,
FEDERAL PRACTICE & PROCEDURE § 2863
(2d ed. 1995) 6, 7

INTRODUCTION

Respondents and their *amici* attempt to defend the lower courts' decisions, but in the end confirm that the federal judiciary has enmeshed itself in highly politicized debates about educational policy. That intrusion should end.

In the eight years since the district court's injunction was entered, a sea change has occurred in state and national educational policies. Significant changes have also indisputably occurred in Nogales's school system. The upshot is that the district court's injunction is no longer needed, as there is no continuing violation of federal law. The injunction should be vacated, and this Court should direct the restoration of local control over Arizona's schools.

ARGUMENT

I. The Legislature Has Standing To Protect Its Legislative Prerogatives.

Respondents half-heartedly suggest that the Legislature "may" lack standing. Flores Br. 22. Jettisoning the argument they pressed below—that the President and Speaker are purportedly not representing the Legislature as a whole—Respondents opine that the Legislature should not participate in this case because the Arizona Constitution "bars the legislature from exercising an executive function." *Id.* at 21-22. The suggestion is misguided.

1. The Legislature's participation in this litigation in no wise intrudes on the Arizona

executive branch's authority. The Legislature did not spontaneously decide to join this case. Instead, it was effectively compelled to appear to *defend* its institutional interests in response to a judicial order commanding it to enact legislation on threat of multi-million-dollar fines. *See* Pet. App. 173a ("it is ordered that the legislature has 15 calendar days ... to comply"); *id.* (if "the State has not complied by the end of the 2006 legislative session a $2 million dollar per day fine will be imposed"). With no party before the court adequately representing its interests, the Legislature was entitled to intervene to protect its prerogatives.

The district court's injunction is causing the Legislature concrete and particularized injury because it invades the Legislature's "plenary power over the expenditures of public money." *Proctor v. Hunt*, 43 Ariz. 198, 201 (1934). It is precisely for this reason that the Legislature formally appointed the Speaker and the President to "represent [its] interests ... in this case" and to take action "on behalf of the Legislature as a whole." JA 81, 84. In these circumstances, the Legislature has standing to protect its institutional interests, preserve its members' votes, and defend the integrity of the democratic process. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939); *Karcher v. May*, 484 U.S. 72, 81-82 (1987).

2. Contrary to Respondents' intimations, nothing in Arizona law obliterates the Legislature's right to defend its institutional prerogatives. Respondents rely on *State ex rel. Woods v. Block*, 189 Ariz. 269 (1997), but that inapposite case addressed whether the Legislature could create a

council to conduct general litigation on behalf of the State. Other Arizona authorities make clear that, when acting as a whole, the Legislature has standing to challenge actions by other branches of state government that result in "direct institutional injury." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 486-87 (2006) (Legislature has standing to challenge Governor's item veto inflicting institutional injury). That conclusion is consistent with this Court's precedents, holding that a legislature has standing to appeal when its powers or duties are "directly affected" by a judicial decree. *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194-95 (1972).

3. Respondents nonetheless suggest that the Legislature is putting this Court in the "uncomfortable position" of "mediating" disputes "between state officials." Flores Br. 22. That suggestion comes with ill grace. It is the lower courts' actions, not the Legislature's response, that has spawned this state of affairs. The problem here is that a federal court improperly permitted its powers to be employed at the behest of one set of state officials to the detriment of another. There is nothing "uncomfortable" about this Court canceling out a lower federal court's invasion of a State's constitutional prerogatives. In this case, as in many others, parties are merely seeking this Court's review to determine whether the lower courts "overstepped [their] bounds," a "kind of review" that "is the standard grist of appellate courts." *Tachiona v. United States*, 386 F.3d 205, 213 (2d Cir. 2004).

As the numerous *amici* briefs attest, the district court's injunction has enmeshed the federal judiciary in hotly disputed questions of local educational policy. The lower courts' attempt to commandeer the State's legislative process to ensure victory for one side of that debate stretches the limits of judicial authority. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (the federal government may not "commandeer[] the legislative processes of the States"). As the Fourth Circuit has recognized, it is "an unfathomable intrusion into a state's affairs—and a violation of the most basic notions of federalism—for a federal court to determine the allocation of a state's financial resources." *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996). Precisely because the "legislative debate over such allocation is uniquely an exercise of state sovereignty," *id.*, a legislature has standing to be heard when its spending power is commandeered by a federal court.

II. The Ninth Circuit Misapplied The Rule 60(b) Standard.

Because the district court's injunction reflects an "unfathomable intrusion" into the State's legislative prerogatives, the lower courts should have stood ready, in the exercise of "sound judicial discretion," to modify the injunction when circumstances changed. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992) (quoting *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961)). The Ninth Circuit instead applied a legally incorrect and unduly rigid Rule 60(b) standard. Respondents and the Solicitor General attempt to

defend the lower court, but their approach only underscores the Ninth Circuit's error by resurrecting the long-superseded standard from *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

A. The Ninth Circuit's Decision Violates This Court's Precedents.

Respondents and the Solicitor General contend that the Ninth Circuit properly applied this Court's precedents and "made no mention" of *Swift*'s "grievous wrong" standard. *See* U.S. Br. 17; Flores Br. 46. To be sure, the Ninth Circuit cloaked its decision with unexceptional citations to relevant precedent and soothing references to a "flexible" standard. But beneath this ornamental layer, the Ninth Circuit's decision substantively departs from this Court's precedents in three fundamental respects. *See* Pet. Br. 37-44.

1. The Ninth Circuit refused to modify the injunction absent a showing that the legal or factual "landscape" had "*radically* changed." Pet. App. 72a (emphasis added). According to the Ninth Circuit, an injunction should not be modified except "in instances, *likely rare*, in which a prior judgment is *so undermined* by later circumstances as to render its continued enforcement inequitable." Pet. App. 60a (emphasis added). The lower court imposed this heavy burden because, as it repeatedly emphasized, the time for appeal had passed and, therefore, in its view, the "interest in finality must be given great weight." Pet. App. 51a; *see also id.* at 62a (district court's legal determinations were "unappealed and are now

final"); *id.* at 68a (refusing to "reopen matters made final").

a. The substantive burden the Ninth Circuit imposed on the Legislature was wrong as a matter of law. The lower court's approach revived in substance the superseded *Swift* standard. The requirement that circumstances "radically change," is a variation on *Swift*'s theme that changes must be "new and unforeseen." *Swift*, 286 U.S. at 119. Similarly, the admonishment that modifications to an injunction are justified only in "rare" circumstances when a judgment is "so undermined" by changed circumstances, tracks *Swift*'s rule that changes must be "so important" that "dangers, once substantial, have become attenuated to a shadow." *Id.*

Any lingering doubt that the Ninth Circuit applied the wrong standard is resolved by Respondents' own arguments. Respondents concede that *Swift* does not apply in the context of institutional reform litigation. But what they usher out the front door they seek to smuggle through the back. Citing Wright & Miller's 1995 treatise, Respondents argue that a party seeking Rule 60(b) relief may not challenge the legal or factual premises of an underlying judgment. *See* Flores Br. 30; U.S. Br. 17. But the treatise relies on cases that pre-date this Court's landmark decisions in *Rufo* and *Frew*. *See* 11 WRIGHT, MILLER, & KANE, FEDERAL PRACTICE & PROCEDURE § 2863, at 340-41 nn.18-22 (2d ed. 1995) (citing *Schildhaus v. Moe*, 335 F.2d 529 (2d Cir. 1964); *Morse-Starrett Prods. Co. v. Steccone*, 205 F.2d 244 (9th Cir. 1953)). Indeed, the treatise passages on

which Respondents rely are built around the following block quote drawn from *Swift*:

> We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.

Id. at 341 (quoting *Swift*, 285 U.S. at 119).

b. The law has dramatically moved in the decades since Respondents' key precedents were decided. More recently, this Court has held that judicial policies favoring finality are substantially diminished by Rule 60(b), "a provision whose whole purpose is to make an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (interpreting Rule 60(b)(6)). To be sure, the Legislature does not seek to revisit the district court's initial judgment that, in 2000, Arizona's educational agencies were not taking "appropriate action." But that does not mean the remedy crafted by the court eight years ago is carved in stone. Modifying a continuing injunction in light of changed circumstances does not impermissibly reopen a final judgment; rather, it faithfully implements that judgment. *See Miller v. French*, 530 U.S. 327, 344-45 (2000).

This Court has unanimously recognized that finality considerations carry little weight in cases where a federal court enjoins state public officials.

See Frew v. Hawkins, 540 U.S. 431, 441 (2004). Federal courts are obliged to remain vigilant not to maintain a status quo that unnecessarily invades local prerogatives. Even if the "basic obligations of federal law ... remain the same," the "precise manner of their discharge may not." *Frew*, 540 U.S. at 442. If there is a reason to modify an injunction, a "court should make the necessary changes." *Id.*

2. Not only did the Ninth Circuit apply the wrong standard, it focused on the wrong considerations. Specifically, the Ninth Circuit gave unwarranted weight to the former Governor's failure to appeal and her "wish" that the injunction "remain in place." Pet. App. 52a. In fact, the failure of certain named defendants to appeal is a centerpiece of the Ninth Circuit's analysis, a point it repeated no fewer than ten times. *See* Pet. App. 15a, 50a, 51a n.31, 59a, 60a, 62a, 68a, 69a, 70a n.41, 72a, 91a. Picking up the lower court's mantra, Respondents and the Solicitor General trumpet this same procedural tack. *See* Flores Br. 7,8, 10, 22, 24-26, 30, 33, 38; U.S. Br. 11, 13-15, 17-18.

a. Whether the named defendants appealed or otherwise consented to the district court's injunctive remedy plays no role in a proper Rule 60(b) analysis. *See* WLF Br. 10-15 (discussing history behind this rule). Precisely because a judicial decree risks undermining "the sovereign interests and accountability of state governments," *Frew*, 540 U.S. at 441, a court must "keep the broader public interest in mind" when considering requests to modify an injunction. *See Rufo*, 502

U.S. at 392. As this Court has emphasized, even a formal *consent* decree is open to modification, because to "refuse modification" is to "bind all future officers of the State, regardless of their view of the necessity of relief." *Id.* at 392; *see also* ALEC Br. 11-14. A State "depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." *Frew*, 540 U.S. at 442.

b. Respondents and the Solicitor General offer no meaningful rejoinder to this fundamental principle. Their only response is the commonplace that public officials presumptively act in good faith. *See* Flores Br. 33 n.7. True (perhaps), but irrelevant. However benign officialdom's intent, the point remains that a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, 505 U.S. 144, 182 (1992).

In any event, the record and the repeated failures to appeal demonstrate that the Legislature's interests were not adequately represented by the named defendants and, therefore, their consent is unavailing. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980). As if to underscore this point, the political maneuvering long infecting this litigation continues unabated. Under Arizona law, the Attorney General has no common law powers; indeed, as Respondents recognize, the Governor directs litigation on behalf of the executive branch. *See* Flores Br. 22; *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 470 (Ct. App. 2007) (the Governor is "the highest executive voice within this state and [may] not be ignored by a

lesser officer of the executive branch"). Nonetheless, in the face of a gubernatorial order to the contrary, the Attorney General has filed a brief that purports to represent the interests of the State of Arizona. *See* Addendum ("Add.") 2-7.

Because the Governor wants control over Arizona's schools returned to the people, *see* Add. 5, the Attorney General's brief does not represent the State's official position. But the abiding point is that no weight should be given to the "consent" of public officials circa the year 2000.

3. Like the Ninth Circuit, Respondents contend that it is not appropriate to "revisit the basic legal premises of the court's earlier orders." Flores Br. 18, 32; Pet. App. 63a (refusing to revisit "basic premises" of district court's "original rulings"). In Respondents' view, a continuing injunction may not be modified until *it* is "fully satisfied." Flores Br. 31; *id.* at 32 (requiring "full satisfaction of the judgment"); U.S. Br. 28-30 (petitioners must demonstrate "full compliance" with the district court's judgment).

This focus on a court's historical interpretation of the law—as opposed to the correct terms of the law itself—again harks back to the superseded *Swift* standard. In particular, it tracks *Swift*'s teaching that a decree "may not be changed ... if the purposes of the litigation *as incorporated in the decree* ... have not been fully achieved." *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (emphasis added) (describing *Swift*). In the context of modern institutional reform litigation, however, this Court has made clear—even in the context of constitutional violations—

that an injunction exceeds "appropriate limits" if it is "aimed at eliminating a condition that does not violate" federal law or "flow from such violation." *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991). A continuing injunction may be enforced only if there is a substantial continuing violation of federal law, not simply a continuing violation of the injunction itself. *See id.*; *Evans v. City of Chicago*, 10 F.3d 474, 477-80 (7th Cir. 1993). The point is elementary: if local officials "can demonstrate that they have remedied the constitutional violations ..., *even without compliance with the details of previous orders or plans*, they must be permitted to do so" and "federal-court oversight must terminate." *Glover v. Johnson*, 138 F.3d 229, 243 (6th Cir. 1998) (emphasis added); *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995)).

B. Arizona Has Satisfied The "Flexible" Standard Under Rule 60(b).

In contrast to *Swift*'s focus on finality considerations and the achievement of a decree's purposes, this Court's more recent decisions make clear that courts confronted with Rule 60(b) motions should focus on their proper judicial role and whether state officials have achieved the underlying purposes of the law. Had the district court applied the "flexible," law-focused standard mandated by *Rufo* and *Frew*, it would have recognized that, in light of significant changes in law and fact, its injunction has come to undermine federal law instead of implementing it.

1. Changes In Fact Require Reassessing The Injunction.

Dramatic changes have occurred in Nogales's schools since the 2000 injunction was entered, and Nogales is now conducting effective ELL programs. *See* Pet. Br. 45-50.

1. Respondents cannot dispute that Arizona voters jettisoned the old bilingual system when, in passing Proposition 203, they required a new system of structured-English-immersion. *See* Pet. Br. 19. Respondents also cannot dispute that, in restructuring its teaching methodology, Arizona has implemented new statewide programs, curricula, and protocols to enhance ELL instruction. *See id.* at 19-21. Respondents likewise do not dispute that experienced educators, including Respondents' own key witness, testified that Nogales is conducting effective ELL programs and providing appropriate ELL instruction. *See* JA 146, 192. Nor do they dispute that the improvements in Nogales's ELL programs are reflected in measurable results. *See* Pet. App. 363a-366a (NUSD placed four schools within the top ten for student performance in 2005); JA 336-338 (NUSD students exhibited superior performance at nearly every grade level). And they offer no rejoinder to evidence that Nogales's programs are successfully preparing ELL students for mainstream classrooms. *See* Pet. Br. 24, 44-50. In fact, reclassified ELL students are not only competitive with—but in some instances outperform—native English-speaking students. *See* JA 191.

Respondents reach out to the Ninth Circuit's own assessment of the record facts. But they are unable to point to a single factual finding establishing that Nogales's schools are presently failing to conduct effective ELL programs. *See* Pet. App. 102a-116a (listing findings of fact and conclusions of law). This absence of relevant findings is not surprising given the injunction's solitary focus on funding. As the Ninth Circuit itself recognized, this case has "been about ... funding since 2000." Pet. App. 69a. Adequate funding was the "only" contested EEOA issue "decided by the court" because the "rest of the EEOA violations originally alleged" were "covered by a consent decree." Pet. App. 10a (emphasis added). As Respondents conceded, the "only unresolved dispute has been the State's failure to provide school districts with adequate funding to cover the costs of the required programs." Cert. Opp. 28.

Respondents now attempt to backpedal from their concession. *See* Flores Br. 28. But the Solicitor General candidly admits that the "*only steps*" remaining to comply with the EEOA are for Arizona school districts to complete the ministerial task of submitting budget forms and "*for the legislature to appropriate funds.*" U.S. Br. 32 (emphasis added). That telling statement misconceives the statutory mandate. The EEOA requires state and local educational agencies to take "appropriate action to overcome language barriers." 20 U.S.C. § 1703(f). It imposes no obligation on the legislative branch to appropriate specific levels of funding. To the contrary,

Congress "intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

2. Attempting to justify the funding decree, Respondents paint a gloomy picture of Nogales's schools. Their pessimism is misplaced. In particular, none of Respondents' contentions establish that Nogales's schools are failing to undertake "a genuine and good faith effort" to provide ELL students with equal educational opportunities. *Id.* And that is what the EEOA requires.

a. Respondents first contend that ELL students in Nogales's high schools perform far worse than their younger counterparts. *See* Flores Br. 39-41. But when extending its injunction, the district court made no findings regarding Nogales's high schools, let alone determined that any performance issue at the high-school level resulted from failure to take "appropriate action." There is a reason for this. The prevailing "trend [] from elementary to middle to high schools is for performance to decline" at higher grade levels for *all* students. Add. 10. In addition, "[m]ost of the research that's ever been done proves younger children starting at age four or five are most easily capable of learning a second language," and that older students "going through adolescence are not as readily willing to speak a different language in class and make mistakes." Add. 8-9, 18. Moreover, Nogales's high schools are burdened by episodic gang problems and endemic drug abuse. Pet. App. 116a. The

challenges faced by Nogales's high schools are indeed unfortunate, but they are characteristic of similar challenges around the country. *See* Tom Vander Ark, *America's High School Crisis: Policy Reforms That Will Make a Difference*, EDUCATION WEEK, Apr. 2, 2003, at 41 (high schools are the "least effective part of the American education system").

b. Respondents next assert that "significant programmatic deficiencies" remain in Nogales. Flores Br. 42. But, here again, no district court findings support this assertion. Nor is there any evidence linking these alleged deficiencies to the effectiveness of Nogales's ELL programs. Instead, the purported deficiencies serve to underscore the problems of judicial second-guessing.

Respondents suggest, for example, that Nogales cannot afford teacher aides, which they say are "essential" to ELL program success. *See* Flores. Br. 42. Yet Nogales's highly regarded former Superintendent, Kelt Cooper, eliminated teacher aides in order to improve ELL education. *See* Add. 11-14 (explaining reasons for eliminating aides). Similarly, although Respondents complain that Nogales struggles to hire qualified ELL teachers, Superintendent Cooper testified that these challenges are "no different than any other district in the United States trying to get some of the best teachers possible." Pet. App. 121a. No district court findings are to the contrary.

c. Respondents' third contention is that, even in the face of unrefuted evidence that Nogales is conducting effective ELL programs, Nogales's schools still lack sufficient funds. Respondents

assert that Arizona is required to provide ELL-specific funding to cover the "actual costs of all elements of ELL instruction" on a state-wide basis. But the requirement that ELL instruction be funded entirely by earmarked funding is a wholecloth creation of the Ninth Circuit. The fact that Arizona has chosen to provide every school district a guaranteed minimum amount of ELL-specific funding, in addition to substantial other sources of funding available for ELL instruction, should be celebrated not condemned. There is no evidence—or district court findings—that the total amount of funds available to Arizona's schools are insufficient to ensure that ELL students receive equal educational opportunities. *See* Pet. App. 177a-178a. Any failure of funding to reach specific ELL students can and should be resolved on a case-by-case basis, not through an intrusive state-wide injunction.

That the guaranteed amount of earmarked funding is arguably insufficient to cover all costs of providing ELL instruction in every Arizona school district is hardly surprising. The reality is that educational costs vary widely from school to school and district to district. It is for this reason that the suggestion, supported by the Attorney General, that Arizona should have relied on state-wide studies to determine the "actual cost" of educating ELL students is just a guise for demanding dramatic increases in funding. These sorts of costs studies are unreliable. There is no magical "actual cost" for educating ELL students that can be divined without making contentious policy judgments about complex, interrelated educational

issues. It is impossible to determine on a blanket, state-wide basis whether individual schools need more funds or should be making more efficient use of funds already available.

Contrary to Respondents' assertions, there is no obligation that the Legislature adopt a one-size-fits-all funding scheme for ELL instruction. Respondents conjure up this obligation by arguing that state law prohibits "substantial disparities" between districts in meeting "basic educational standards." Flores Br. 45-46. But the district court never determined that Nogales (or any other school district) lacks sufficient base-level funding to meet basic educational standards and conduct appropriate ELL programs. Any suggestion to the contrary is pure speculation regarding hypothetical scenarios not reflected on this record. *See id.* at 45 (imagining hypothetical situation where employing base-level funding for ELL instruction would prevent districts from meeting basic educational obligations). Nor is there anything in state law preventing local schools from taking appropriate action to address their own local circumstances. "Disparities caused by local control do not run afoul of the state constitution." *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 242 (1994).

Finally, Respondents contend that base-level funding is inadequate because Nogales "drew on base-level state funding to support its ELL programs at the time of the initial 2000 judgment." Flores Br. 44. But that suggestion ignores the Legislature's fundamental point: circumstances have changed. By adopting structured-English-immersion, Nogales's schools have dramatically

improved precisely because they have implemented programs and processes to encourage accountability. In this regard, Superintendent Cooper's testimony is devastating to Respondents' constant spend-more-money refrain. He testified without hesitation that, absent the structural changes that he imposed, "additional money" from the Legislature would "have made [no] difference to the[] students" in Nogales. Add. 15. There are no district court findings to the contrary.

2. Changes In Law Require Reassessing The Injunction.

Significant changes in the operative legal framework have rendered the lower court's funding mandates at war with newly-fashioned federal policies.

1. Respondents and their *amici* expend considerable energy assailing an argument the Legislature has not advanced. They characterize the Legislature as contending that NCLB "entirely displace[s]" the EEOA's requirements. Flores Br. 54; *id.* at 48, 53 (compliance with NCLB "automatically satisfies" the EEOA's mandate). The Solicitor General likewise contends that nothing in NCLB "indicates an intent to displace entirely the EEOA" and that receipt of federal funding under NCLB is not a "complete defense to liability under the EEOA." U.S. Br. 24. Respondents argue that, because NCLB and the EEOA do not completely overlap, the EEOA may be employed to remedy deficiencies not addressed in NCLB.

Those contentions may or may not be true in some other case involving individualized EEOA violations. But this case concerns a sweeping judicially-crafted remedy that operates state wide to address a purported deficiency limited to funding. The question is not whether NCLB displaces the EEOA in every context, but whether it informs the meaning of "appropriate action" in this one.

The whole purpose of NCLB is to ensure equal educational opportunities through a reticulated administrative scheme that preserves flexibility for local educators by requiring States to develop state-wide plans for educating ELL students that must be approved by the Department of Education. *See* Pet. Br. 11-16, 57-64. NCLB's detailed requirements set a baseline for defining "appropriate action" at the state level. Once a state educational plan has been approved by the Department of Education, a federal court should not wield the EEOA's opened-ended requirements to order the State to develop a different "educationally sound and administratively feasible plan" requiring increases in state-wide funding. 20 U.S.C. § 1713(g). State-wide funding mandates imposed under the EEOA will inevitably undermine the flexibility and accountability that NCLB is designed to foster.

2. Respondents and the Solicitor General complain that the EEOA and NCLB have different enforcement schemes; that NCLB gives States too much flexibility; and that Department of Education oversight is not meaningful. *See* Flores Br. 52-60; U.S. Br. 21-24. These assertions boil down to a

disagreement with the congressional policies embodied in NCLB, and reflect the view that courts are free to strike a different regulatory balance than Congress.

In any event, Respondents' and the Solicitor General's assertions are misleading. NCLB was not, as Respondents suggest, merely designed to place conditions on federal funding. *See* Flores Br. 50. To the contrary, when a State adopts a plan under NCLB, it must provide adequate assurances that all ELL students receive assistance "to achieve at high levels in the core academic subjects so that those children can meet the same ... standards as all children are expected to meet." 20 U.S.C. § 6812(2). That plan must be submitted to the Department of Education, which has authority to reject the plan for failing to satisfy NCLB's requirements. *See Connecticut v. Spellings*, 453 F. Supp. 2d 161, 164-65 (D. Conn. 2006). Although NCLB creates no private right of action, its lack of judicial remedies underscores that Congress intended to limit judicial intrusions into local educational prerogatives. Contrary to the Solicitor General's suggestion, available administrative remedies are not fictional. At least twenty-four States, including Arizona, have adopted complaint procedures that permit individuals to submit Title III NCLB grievances to the Department of Education. *See* Add. 19. The regulation cited by the Solicitor General is a vestige of the pre-NCLB era; its outdated provisions do not even correspond with NCLB's titles and subparts. *See* U.S. Br. 23 n.5 (citing 34 C.F.R. § 299.10(b)).

3. Respondents and the Solicitor General argue interpreting NCLB as informing the EEOA's "appropriate action" requirement would run afoul of NCLB's savings clause. *See* U.S. Br. 23 (citing 20 U.S.C. § 6847). Not so. The EEOA expressly delimits courts' authority to "impose only such remedies as are *essential* to correct *particular* denials of equal educational opportunity." 20 U.S.C. § 1712 (emphasis added). Although an EEOA suit may be mounted against either a local or state educational agency, *see id.* § 1720(a), nothing in the statute suggests that courts may grant remedies beyond those "essential" to correct "*particular* denials" of equal educational opportunity. *Id.* § 1712 (emphasis added). Moreover, the EEOA identifies a "priority of remedies" and requires courts to make "specific findings on the efficacy" of its chosen remedy. The most drastic remedy permitted is "the development and implementation" of an "educationally sound and administratively feasible" plan. *Id.* § 1713(g).

Respondents and the Solicitor General contend that the EEOA's limits on courts' remedial authority apply only in the context of busing and desegregation. Flores Br. 27 n.4; U.S. Br. 13 n.4. That assertion is irreconcilable with the statutory text. On its face, section 1713 applies whenever a court formulates "a remedy for a denial of equal educational opportunity." The provision's non-restrictive clause ("which may") merely recognizes that a remedy "may" involve busing. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN AMERICAN USAGE 422, 647-58 (distinguishing between restrictive and non-restrictive clauses). The

provision cannot be reasonably interpreted as being limited *solely* to busing remedies. *HUD v. Rucker*, 535 U.S. 125, 131 (2002) (rejecting interpretation that "runs counter to basic rules of grammar"). In any event, the EEOA's focus on busing and desegregation confirms the Legislature's overarching point—Congress devised the EEOA to guide courts in fashioning remedies for dismantling dual school systems. 20 U.S.C. § 1702(a). Congress could not have intended to constrain courts' authority when eliminating the vestiges of segregation, but nonetheless grant courts broad discretion to dictate local educational policy.

4. Holding that federal courts should not continue to enforce an eight-year-old injunction imposing sweeping, state-wide funding mandates would not displace the EEOA. Flores Br. 54. To the contrary, the "EEOA remains a vital protection against civil rights violations." Pet. Br. 60. If local "schools" and "districts" operating under a state-approved NCLB plan fall short of their EEOA obligations, then a state or local educational agency may be required to take corrective action. *See* Asian Am. Legal Def. & Educ. Fund Br. 25-26, 35. But, under the EEOA, asserted violations of individual rights should be redressed through targeted remedies aimed at correcting "particular" deficiencies in individual schools or school districts. 20 U.S.C. § 1712; *see Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (courts should decide questions "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"). There is a stark

difference between requiring educational agencies to do a better job of addressing particular deficiencies and ordering a state legislature to dispense state-wide funding remedies. Contrary to Respondents' assertions, this distinction poses no line-drawing problem. *See* Flores Br. 54 n.12. As the Court has recognized in other contexts, a "case-by-case approach" is the "traditional" and "normal ... mode of operation of the courts." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990); *see also Lewis v. Casey*, 518 U.S. 343, 359 (1996).

5. Respondents assert that the EEOA must be interpreted to authorize state-wide remedies for "systemic failures" because "most violations of the EEOA derive in some measure from broader, systemic failures." Flores Br. 54 n.12. This broadside is supported by no meaningful analysis. Nothing in the EEOA suggests that courts may require a state legislature to adopt across-the-board funding increases.

Castaneda confirms this point. Contrary to Respondents' assertions, *Castaneda* does not suggest that a federal court may mandate States to provide resources earmarked for ELL instruction. Instead, the appropriate inquiry is whether "the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school." *Castaneda*, 648 F.2d at 1010. As the Fifth Circuit explained, Congress "must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." *Id.* at 1009. Accordingly, the

obligation is on the local "school system" to "follow through with practices, resources, and personnel necessary to transform" their educational theory "into reality." *Id.* at 1010. That is exactly what happened in Arizona.

3. HB 2064 Poses No Impediment To Rule 60(b) Relief.

Respondents contend that Rule 60(b) relief should be denied because HB 2064 is legally infirm. Their focus on HB 2064 confirms that this case is all about money.

1. In Respondents' view, HB 2064 is unlawful because it cuts off Group B and Structured-English-Immersion funding for ELL students after two years. *See* Flores Br. 35. But that position reflects only one side of a contentious policy debate. In Proposition 203, Arizona's citizens expressed profound dissatisfaction with costly "experimental language programs." Pet. App. 370a. Indeed, Arizona's citizens declared that "all children in Arizona public schools shall be taught English as rapidly and effectively as possible," *id.*, and that ELL students "shall be educated though sheltered English Immersion during a temporary transition period *not normally intended to exceed one year*." *Id.* 373a (emphasis added). Given this, the Legislature, in turn, required a shift in funding mechanisms after two years of unsuccessful ELL instruction. It did so because, although the amount of Group B funds a school receives is based on its number of ELL students, the funds may be used for any discretionary purpose. *See* Pet. App. 306a. In that context, holding schools temporally

accountable avoids perverse incentives to keep students languishing in special-language programs.

As Respondents concede, HB 2064 does not deprive schools of funds for those ELL students who are not English-proficient after two years. *See* Flores Br. 35. Instead, HB 2064 provides additional funds for "compensatory instruction." As defined by statute, "compensatory instruction" means "programs in addition to normal classroom instruction," including "individual or small group instruction, extended day classes, summer school or intersession school," that are limited to improving the English proficiency of current and recently reclassified ELL students. Ariz. Rev. Stat. § 15-756.11(G); Pet. App. 306a. The statute thus rationally requires that, if regular ELL programs are not working, educators must take action to develop individualized programs to help struggling students. Contrary to the Solicitor General's suggestion, compensatory instruction funds are not limited to instruction "outside of the normal class day." U.S. Br. 30. Instead, they may be used at any point in the day so long as they are used "in addition to normal classroom instruction." Ariz. Rev. Stat. § 15-756.11(G). There has been no showing or finding by the district court that this approach is unsupported by sound educational theory.

2. Respondents complain that HB 2064 runs afoul of NCLB because the lower courts found that the measure violates federal supplanting restrictions. Flores Br. 36. This conclusion is flawed. NCLB merely prohibits States from employing federal funds to cover "core" educational

obligations that would otherwise be funded with state monies; it does not require that States pay *all* costs of ELL instruction. Any contrary interpretation renders meaningless NCLB's Title III, as well as several provisions of Title I, inasmuch as the statute specifically contemplates using federal funds for ELL instruction. *See* 20 U.S.C. §§ 6801, 6302.

More fundamentally, the lower court should not have reached out to decide the issue. NCLB includes no private right of action; instead, NCLB compliance falls within the Department of Education's exclusive jurisdiction. *See Spellings*, 453 F. Supp. 2d at 486-87. The district court's approach thus effectively permitted Respondents to pursue a private right of action that Congress never intended. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). To be sure, the Department of Education has issued an informal, non-binding letter suggesting that HB 2064 may, in its judgment, violate NCLB's supplanting restrictions. But that letter is not final agency action. *See General Motors Corp. v. EPA*, 363 F.3d 442, 450 (D.C. Cir. 2004) (agency correspondence not final action if it does not impose an obligation to act). Nor is it a formal determination that HB 2064 violates federal law. The district court's interceding order has thus short-circuited the ordinary administrative process.

III. The Court Should Direct The Restoration Of Local Control Over Arizona's Schools.

This case has placed the federal judiciary at the center of a highly politicized, contentious debate

over how best to run Arizona's schools. The district court's state-wide injunction, commandeering the Legislature's spending power, stretches judicial authority to its outer limits. State-wide spending mandates directed not at "educational agencies" but at a state legislature go far beyond what Congress contemplated under the EEOA and raise serious federalism and separation-of-powers concerns. Those concerns are heightened by the Attorney General's tepid defense on the merits, failure to appeal in 2000, and subsequent efforts to "defend" the district court's injunction. Flores Br. 22.

Whatever the propriety of the district court's injunction in 2000, the fact remains that in the last eight years circumstances have significantly changed. Respondents resist that conclusion, but they do not dispute that Arizona has implemented an entirely new approach to teaching ELL students; that Congress has comprehensively restructured federal education policy; and that, as the Ninth Circuit acknowledged, the State has "developed a significantly improved infrastructure for ELL programming." Pet. App. 46a. Nor can they deny that Nogales's schools are "doing substantially better." *Id.*

In light of these changed circumstances, the Rule 60(b) question is whether the federal judiciary should continue to require dramatic state-wide funding increases. The answer is no.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's decision below and direct the vacatur of the district court's injunction.

Respectfully submitted,

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KYLE T. CUTTS
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85102
(602) 200-0104

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Counsel for Petitioners

April 13, 2009

ADDENDUM

TABLE OF CONTENTS

Letter From Governor of Arizona
Janice K. Brewer to Attorney General
Terry Goddard, dated March 11, 2009 ..... Add-2

Letter From Attorney General
Terry Goddard to Governor of Arizona
Janice K. Brewer, dated March 16, 2009 ..... Add-3

Letter From Governor of Arizona
Janice K. Brewer to Attorney General
Terry Goddard, dated March 31, 2009 ..... Add-5

Excerpt from Testimony of
Rosalie Porter Add-8

Excerpt from Testimony of
Irene Moreno Add-10

Excerpts from Testimony of
Kelt Cooper Add-11

Excerpt from Testimony of
Guillermo V. Zamudio Add-17

Table of State Procedures for
NCLB Complaints Add-19

Letter From Governor of Arizona Janice K. Brewer to Attorney General Terry Goddard dated March 11, 2009

Re: *Flores v. State of Arizona*, Nos. 08-289 and 08-294

Dear Mr. Goddard:

Your office represents the State of Arizona in *Flores v. Arizona*. It is my understanding that your office has acted at the behest of my predecessor throughout the course of this litigation. I therefore write to clearly establish the position of the State of Arizona in these cases currently pending before the United States Supreme Court.

After carefully reviewing the above cases and the issues currently before the Court, I hereby direct you to file a brief at the Court on behalf of the State of Arizona adopting and joining in the positions taken by the Superintendent of Public instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate.

Further, you are directed to take any and all actions on behalf of the State of Arizona necessary to aid, facilitate and support the positions taken by the Superintendent, the Speaker, and the President in these cases before the Court.

Sincerely,

/s/ Janice K. Brewer
Governor

cc: The Honorable Thomas C. Horne
The Honorable Bob Burns
The Honorable Kirk Adams

Letter From Attorney General Terry Goddard to Governor of Arizona Janice K. Brewer dated March 16, 2009

Dear Governor Brewer:

I have received your March 11, 2009 letter concerning *Flores v. State of Arizona*. It has always been my practice to attempt to work cooperatively with the Governor on litigation involving the State, and I hope we will be able to continue that practice.

Your letter directs me to file a brief with the United States Supreme Court on behalf of the State of Arizona adopting and joining in the positions taken by the Superintendent of Public Instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate. Your letter appears to be based on the mistaken premise that the Governor determines the legal position to be taken on behalf of the State of Arizona in pending litigation. The State of Arizona and the Arizona State Board of Education are the defendants in the *Flores* case; the Governor is not a party. In any event, Arizona law makes it clear that as the chief legal officer for the State, the Attorney General is responsible for representing the State and rendering such legal services as the State requires, which includes determining the appropriate legal positions to be taken on behalf of the State.

Although I always value your input and input from your staff, it is my responsibility to determine the legal position to be taken on behalf of the State of Arizona in the *Flores* case. My staff has sent your chief counsel a draft of the brief we are preparing. I welcome any constructive comments he might have.

You may not be aware of the June 6, 2008, letter from the United States Department of Education to Superintendent Horne, so enclosed is a copy. In that letter, the United States Department of Education has put the State of Arizona on notice that the offsets required by the Arizona law (HB 2064) violate the federal Elementary and Secondary Education Act. Such a violation could cause the State to lose $600 million *per year* federal aid to education, with serious adverse consequences to all K-12 students in Arizona. One of the principal objectives of the brief we are preparing to file with the Supreme Court is to minimize any risk that the State might suffer from such a devastating financial blow. For the sake of Arizona's students, not to mention the overall fiscal health of our State, we must do no less.

The Supreme Court should render a decision by the end of June. I hope we can work together based on the guidance we receive from the Court to address any remaining issues in this litigation.

Sincerely,

/s/ Terry Goddard
Attorney General

Letter From Governor of Arizona Janice K. Brewer to Attorney General Terry Goddard dated March 31, 2009

Re: *Flores v. State of Arizona*, Nos. 08-289 and 08-294

Dear Attorney General Goddard:

I am surprised that you have chosen to ignore my directive to take any and all actions on behalf of the State of Arizona necessary to aid, facilitate and support the positions taken by the Superintendent, the Speaker, and the President in the above case before the United States Supreme Court.

While I am pleased that you concede that the prior disagreement among State officers in this case does not eliminate federalism concerns or alter the 60(b) analysis in any fashion, your other arguments are contrary to the position of the State of Arizona. I am certain the Court will soon realize that you have not appropriately set forth the position of the State in these cases.

Your letter dated March 16, 2009, erroneously asserts that you alone determine the legal position on behalf of the State of Arizona in pending litigation. This is contrary to the Arizona Constitution, state law and your prior actions in these cases. Moreover, your position runs afoul of the basic role of an attorney, which is to represent the client and abide by the client's decisions concerning the objectives of representation. As you noted in the Arizona Republic today, "[i]t's black-letter law that conflicts of interest matter . . . and if there's a conflict, you've got to step aside."

You simply cannot serve as both attorney and client in this matter.

Our state constitution prescribes that the Governor has the duty of "tak[ing] care that the laws [are] faithfully executed" [art. 5, § 4] and performing "such duties as are prescribed by the constitution and as may be provided by law" [art. 5, § 1(C)]. These provisions clearly establish that the Governor is in charge of the Executive Branch and sets the policy and positions of the State of Arizona. Such powers do not and cannot devolve to the Attorney General simply because a lawsuit is brought against the State.

According to the Arizona Constitution [art. 5, § 9], your powers as Attorney General are limited to those prescribed by law. Your role by constitutional design is one of legal advisor and not policy maker. There is no statutory authority that permits you to disregard the direction of the Governor and establish state policy in matters involving the State before the U.S. Supreme Court. As the Arizona Supreme Court so aptly stated in *Arizona State Land Dep't. v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960), "the Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed."

As I noted in my previous letter, your office acted at the direction of my predecessor throughout the course of this litigation. For example, during your testimony on January 26, 2006, before the House of Senate Joint Appropriations Committee you responded to a question from Representative

Knaperek by asserting that you represent the Governor in this case. Moreover, during the oral argument at the Ninth Circuit on December 4, 2007, counsel for the State told the court in no uncertain terms that the Governor was his client and would have to be consulted with regard to any decision made on behalf of the State. There are other examples in the case history where the Governor directed you to take positions in the case and you rightfully abided. It is troubling that your position has changed now that I have assumed the office of Governor. I fear politics may be at play.

If you continue to insist that you alone speak for the State of Arizona in litigation then I will pursue legislation that will require you to act within the scope of your constitutional authority and to refrain from exercising powers not lawfully yours in future litigation involving the State.

I hope you will reconsider your position. In these challenging times we should be working together as elected officials rather than trying to usurp and undermine the authority of another office.

/s/ Janice K. Brewer
Governor

cc: The Honorable Thomas C. Horne
The Honorable Bob Burns
The Honorable Kirk Adams

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 9, 2007 9:58 a.m.

[PORTER, T-1, 110-111]

Excerpt from Testimony of Rosalie Porter

* * *

p. 110

. . .

Q. Is there a difference in the rate of learning English between younger children and older children?

A. Most of the research that's ever been done proves younger children starting at age four or five are most easily capable of learning a second language and capable of developing literacy in a second language. That is not just learning to speak, but learning to read and write in a second language.

Q. Why is that when you're younger?

A. I guess that's the way human beings are wired. Now, there's another side to this, though. Older children are more efficient learners, and let me explain that a little bit.

You cannot take a five-year-old child and sit him down at a desk and say, "Now, Jose, we're going to teach you English for four hours." They can't sit still that long. But you can take a child at that age and teach them English through games and songs, pictures, and all sorts of things and you're going to develop the language very quickly.

p. 111

Younger children are not -- they're not as shy, they're not afraid to make mistakes. Now, older children are more efficient learners and a high school student can take three or four hours a day of English, but when you get to that magic age 13, kids going through adolescence are not as readily willing to speak a different language in class and make mistakes and have other kids laugh at them.

So there are -- you know, there are differences. Certainly we would like to start early with children who need to learn English. It is the most effective way to do it.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 11, 2007 10:00 a.m.

[MORENO, T-3, 60:3-12]

Excerpt from Testimony of Irene Moreno

* * *

p. 60

. . .

Q. Now, would you say the trend here from elementary to middle to high school is for performance to decline at these schools?

A. Yes.

Q. That's generally true for English language learners, isn't it?

A. I think it's generally that way for students as a whole. As a middle school teacher there's a lot of other things going on and we -- they had a tendency to not do as well.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 12, 2007 10:15 a.m.

[COOPER, T-4, 10-13]

Excerpt from Testimony of Kelt Cooper

* * *

p. 10

. . .

Q. I guess my question was, did the -- did the Nogales Unified School District after Prop 203 passed move to structured English immersion and did it have a positive effect in terms of getting English language learners to learn?

A. Yeah, and I think also it eliminated the tremendous debate that exists even in this forum here on which modality is the best, because it limited the discussion and arguments which I think caused such a variety of individual applications out in the classroom.

So it certainly limited the political and philosophical debate on which was the most appropriate program because it narrowed it. So it simplified our work because it narrowed the scope and the focus, which I think is always good because then you can analyze the results better.

Q. And by the time that you left in June of 2005 were all of the schools in the Nogales Unified School District following the structured English immersion strategies?

A. To one degree or another, yes.

Q. Now, yesterday you spoke briefly about the elimination of teacher aides in the basic classroom.

A. Yes.

p. 11

Q. Now, when we talk about the elimination of teacher aides in the basic classroom, was that for all students or was it simply for ELL students?

A. Over the years it's been my belief and my observations that teacher aides in most circumstances wind up picking up a great deal of the instructional load. They're delegated certain responsibilities by the teachers over time as trust is developed and relationships are developed between the teacher and the teacher aide. It's been my belief long held that in so doing the teachers are relinquishing some of the diagnostic benefits of doing the instruction themselves. As the classes we reduced in size, one, from a fiscal aspect they were no longer needed, we could save money by not having them in the regular classrooms, but more importantly, we were trying to design a program

where the teachers were more engaged directly with their students rather than delegating some of their instructional and diagnostic responsibilities to teacher assistants.

However, in cases where you've got multiply impaired students where there's a great deal of handicaps and there's a great need for a one-to-one or two-to-one ratios we certainly kept that in mind because of the severity of some of our students' needs

p. 12

in special education, and in addition, as we were constructing opportunities for teachers to have prep time at the elementary schools, which never existed before, we introduced physical education courses in the elementary school, which allowed great numbers of students at a single time to go out into the play yard under the supervision of a PE teacher and some aides, and that was done to facilitate the numbers, which in turn allowed teachers to have common prep time so they could do individual or group prep planning.

Q. With those exceptions, physical education, special education, were teacher aides essentially eliminated from the classroom per your recommendation to the board of education?

A. I don't know if it was an actually recommendation, it was just a process that we followed. We just began to not fill teacher aides. And the board was aware of that process all through.

And, again, I think in many circumstances teacher aides are really a mechanism or an opportunity to generate additional jobs in a community as a lot of schools have the schools being

their principal employer, so if they can generate a few extra jobs in teacher aides it generates jobs in the community.

But from my perspective I didn't see any

p. 13

sense that we were designed to be the employer for the community rather than focusing on direct instruction.

Q. I think you may have mentioned this yesterday, but did you say that many of the aides had no GED?

A. Many of the aides were substandard, didn't speak English. I wouldn't want my kids to be instructed by them. GEDs, may or may not have had them. If they had a GED it's hardly what I consider a type of educational background I'd want to have as the primary -- one of the coprimary teachers for the student, which is usually what occurs in these classrooms.

Q. So are you saying on a cost-benefit analysis it's better to have a good-quality teacher and lower classrooms -- lower-size classrooms instead of having aides for every classroom?

A. Well, that's a maxim that I carried through time and time again with the principals, that I'd rather have smaller classes, quality teachers and fewer, if any, aides at all, but the idea was I'd rather have smaller classrooms and better teachers, full certified teachers.

* * *

[COOPER, T-4, 71]

Excerpt from Testimony of Kelt Cooper

* * *

p. 71

. . .

Q. Okay. Now, one last question. Had the legislature of the state of Arizona given you additional money in the year 2000 and the structures that you found that were in place in August of 2000 had been left in place, would the additional money in your opinion have made any difference to these students in the Nogales Unified School District?

A. No.

MR. BISTROW: No further questions.

THE COURT: Mr. Cantelme.

CROSS-EXAMINATION

BY MR. CANTELME:

Q. Mr. Superintendent, did I understand it that you headed up the fourth or fifth poorest district in Texas at one time?

A. Yes.

Q. Sounds like you've got a lot of empathy for poor children, sir?

A. Absolutely.

Q. And also sounds like you detest the waste of tax money that could help poor children?

A. That is correct.

MR. CANTELME: Nothing Further, Your Honor.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 18, 2007 9:52 a.m.

[ZAMUDIO, T-6, 128]

Excerpt from Testimony of Guillermo V. Zamudio

* * *

p. 128

. . .

Q. I agree with you, sir, that is a reality. In fact, Dr. Porter told us that the children that come to your -- that come to the United States in the high school years, for them it may be more difficult than it is for the children that come as kindergartners; correct?

A. I believe that that would be correct. I heard her testimony to that and I concur that if they come in in high school and they are beginning to learn a new language, obviously it's a much more difficult task and challenge for those students as compared to those who may be more skilled in the language.

Q. Is it a fair statement the way our brains are constructed that it's easier to learn another language the younger you are, at least in the K-12 range?

A. My understanding is that the younger you are the easier it is to learn a new language. That's my understanding.

Table of State Procedures for NCLB Complaints

STATE	REGULATION	SOURCE
Alabama	Federal Programs Section - Complaint Procedures	Alabama Department of Education, https://egrant.alsde.edu/Acceleg rants/Document Library/Documents/7E15A9E0-14D6-4D62-A478-AA5D484895B4.doc (last visited Apr. 9, 2009).
Arizona	NCLB Complaint Procedures	Arizona Department of Education, http://www.ade.state.az.us/asd/nclb/ (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Arkansas	Complaint Resolution Procedures	Arkansas Department of Education, arkedu.state.ar.us/commemos/attachments/LS-07-013_ComplaintResolProced.doc (last visited Apr. 9, 2009).
California	UCP Brochure 2009 - Complaint Procedures	California Department of Education, http://www.cde.ca.gov/re/cp/uc/documents/UCPBrochure.2009.pdf (last visited Apr. 9, 2009).
Colorado	Federal Complaint Procedure	Colorado Department of Education, http://www.cde.state.co.us/FedPrograms/NCLB/fdcomplaint.asp (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Connecticut	Complaint Resolution Procedure	Connecticut State Department of Education, http://www.csde.state.ct.us/public/cedar/nclb/CRP/Complaint%20Resolution%20Procedure%2008.pdf (last visited Apr. 9, 2009).
Florida	NCLB Complaint Process	Florida Department of Education, http://www.fldoe.org/NCLB/complaint_process.asp (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Georgia	Complaint Procedures under the No Child Left Behind Act	Georgia Department of Education, http://public.doe.k12.ga.us/DMGetDocument.aspx/Georgia%20Department%20of%20Education%20SEA%20Complaint%20Procedures.pdf?p=4BE1EECF99CD364EA5554055463F1FBBF5D074D5FB1F2CAEB3B63B3ECB220CDD26C2114F3C57D8D2A94DF3E8B084D770&Type=D (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Indiana	NCLB Complaint Procedures	Indiana Department of Education, www.doe.in.gov/TitleI/pdf/NCLBComplaintProced.pdf (last visited Apr. 9, 2009).
Kansas	Complaint Resolution Procedures	Kansas State Department of Education, www.ksde.org/Portals/0/Title%20Programs%20and%20Services/NCLB/complaint_res_proc_b.pdf (last visited Apr. 9, 2009).
Maine	Complaint Resolution Procedures	Maine Department of Education, http://www.state.me.us/education/nclb/tia/home.htm (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Mississippi	Mississippi Administrative Procedure for Complaints or Appeals under the No Child Left Behind Act of 2001	Mississippi Department of Education, www.mde.k12.ms.us/innovative_support/compliance/MS%20Complaint%20Policy.pdf (last visited Apr. 9, 2009).
Missouri	NCLB Complaint Procedures	Missouri Department of Elementary and Secondary Education, www.dese.mo.gov/divimprove/fedprog/grantmgmnt/PDF_Files/07_nclb_complaint_resolution.pdf (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
New Jersey	Complaint Policy and Procedures	State of New Jersey Department of Education, http://www.nj.gov/education/grants/nclb/issues/complaint_policy.htm (last visited Apr. 9, 2009).
North Carolina	Complaint Resolution Procedures	Public Schools of North Carolina, State Board of Education, http://www.ncpublicschools.org/nclb/federal/complaint/ (last visited Apr. 9, 2009).
North Dakota	Dispute Resolution Policy Requirements	North Dakota Department of Public Instruction, www.dpi.state.nd.us/title1/dispute.pdf (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Ohio	Complaint Procedures	Ohio Department of Education, https://ccip.odc.state.oh.us/DocumentLibrary/ViewDocument.aspx?DocumentKey=926 (last visited Apr. 9, 2009).
Oklahoma	Federal Programs Complaint Procedures	Oklahoma State Department of Education, http://sde.state.ok.us/NCLB/Complaint.html (last visited Apr. 9, 2009).
Pennsylvania	NCLB Complaint Resolution	Pennsylvania Department of Education, http://www.pde.state.pa.us/k12/cwp/view.asp?a=166&q=108181 (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
South Carolina	Complaint Resolution Procedures	South Carolina Department of Education, http://ed.sc.gov/agency/Accountability/Federal-and-State-Accountability/old/fp/Title_I/titleI.html (last visited Apr. 9, 2009).
South Dakota	State Complaint Procedure for NCLB Federal Programs	South Dakota Department of Education, http://doe.sd.gov/nclb/ (last visited Apr. 9, 2009).
Tennessee	Complaint Procedures for Federal Programs under the No Child Left Behind Act of 2001	Tennessee Department of Education, http://www.state.tn.us/education/fedprog/fpcomplaints.shtml (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Texas	No Child Left Behind Federal Program Complaints	Texas Education Agency, http://ritter.tea.state.tx.us/Complaints/index_AllComplaints.html (last visited Apr. 9, 2009).
Wisconsin	Wisconsin Administrative Procedure for Complaints or Appeals under the No Child Left Behind Act of 2001	Wisconsin Department of Public Instruction, http://dpi.wi.gov/esea/topics.html (last visited Apr. 9, 2009).